United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1333

To be argued by
HERBERT S. KASSNER

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1333

UNITED STATES OF AMERICA,

Appellee,

against

MARTIN J. HODAS, *et al.*,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT, MARTIN J. HODAS

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BRIEF FOR THE APPELLANT,
MARTIN J. HODAS

PRELIMINARY STATEMENT

Martin J. Hodas, appeals from a judgment entered in the United States District Court for the Southern District of New York (Metzner, J.) on July 24, 1975, convicting him of an attempt to defeat and evade $65,397.37 in corporate income taxes due and owing to the United States of America for the fiscal year ending February 28, 1969, said taxes being owed by East Coast Cinerama Theatre, Inc., a New York corporation; and was additionally convicted of causing to be made, and subscribing to, a corporate income tax return which he did not believe to be true and correct as to every material matter, said return being for the corporation designated above and for the taxable year designated. Defendant Martin Hodas therefore stands convicted of violations, respectively, of Section 7201 of Title 26 of the United States Code, and Section 7206 of Title 26 of the United States Code.

The indictment presented in this case contained three counts, the first of which was a conspiracy count relating to the substantive violations alleged in Count 2. Mr. Hodas was acquitted of the Count 1 conspiracy charges, as was his co-defendant, Herbert J. Levin, who was himself acquitted of all three counts.

After a four day trial before Judge Metzner, the jury found Mr. Hodas guilty of the substantive violations of Section 7201 (Count 2) and 7206 (Count 3) of Title 26 of the United States Code, and acquitting the defendant Herbert J. Levin of all counts, and acquitting Mr. Hodas of Count 1 of the indictment. Mr. Hodas was subsequently sentenced by the District Court to a term of imprisonment of one year.

On May 19 and May 20, 1975, in the District Court, a hearing was conducted by Judge Metzner to inquire into the facts and circumstances surrounding a search conducted by New York City police officers on January 27 and January 28, 1972 at two physical locations, namely, 210 East 42nd Street in New York City and 113 East 42nd Street in New York City during the course of which searches physical evidence critical to the case of the United States Government under this indictment, namely, certain duplicate books and records of East Coast Cinerama Theatre, Inc., were seized by those New York City police officers, copied, and turned over to the Internal Revenue Service of the United States and were eventually employed in the presentation of evidence by the United States of America, and are specifically referred to in Count 1 of the indictment.

STATEMENT OF FACTS

(1)

On January 27, 1972, Detective Donald Gray of the New York City Police Department, together with officers of that Department (6), acting pursuant to a search warrant issued by Judge Hyman Solniker of the New York City Criminal Court, proceeded to the "Black Jack" bookstore at 210 West 42nd Street in the County of New York.

In the course of the authorized search of said premises for "business records" relating to the sale of an allegedly obscene book (4,5,6), Detective Gray entered into a separated and segregated rear of the ground floor at 210 West 42nd Street (7,8) and conducted an additional search of that area and interrogation of an employee of East Coast Cinematics, Inc, lessee of that rear area, working therein (8,9,10). During this second and separate search and inquiry conducted under the ostensible cloak of authority of Judge Solniker's warrant, Detective Gray and other officers seized various boxes of film (50,52,53,58,59), each box marked on the outside with a different name, and brought these films to Judge David Weiss of the New York City Criminal Court for his review. Pursuant to a review of at least two of these three films (58) and upon the affidavits of Detective Gray, Judge Weiss issued

two further search warrants. The first of these additional warrants authorized the search for, and seizure of the same three films earlier seized by Detective Gray from and in the rear area segregated premises at 210 West 42nd Street.

The second additional warrant authorized a search of the offices of East Coast Cinematics, Inc. on the 17th floor at 113 West 42nd Street in New York County for books and records of that corporation reflecting a "peep show" business in violation of Section 235.06 of the Penal Law of New York State.

In the execution of the warrant to search the corporate offices of East Coast Cinematics, Inc., Detective Gray and other officers forced an entry into said offices and commenced a search of same for the materials authorized by Judge Weiss' warrant. In the course of conducting this search, and upon his initial entry into the premises, Detective Gray observed a listing of the names of various corporate entities which he assumed were housed with the offices of East Coast and concluded that the intermingling of books and records and related business materials of these corporations within the 17th floor premises rendered a seizure of the material mandated in the original warrant totally impractical.

As a result of the above conclusion Detective Gray swore out an additional affidavit and returned to the New York City Criminal Court, this time to Judge William Shea from whom he obtained a warrant authorizing him for all practical purposed to seize every item in the offices of East Coast Cinematics, Inc. and related corporations.

(2)

210 WEST 42ND STREET

The facts before the District Court as regards the premises originally searched by Detective Gray, with specific reference to the disputed rear area thereof, all indicate that said area was partitioned from the remainder of the ground floor book store premises, and that a door, which was generally kept locked, and which was marked with a corporated name and a warning not to enter barred entrance to the general public into the rear area work room and stairway to the basement storage and work area. There is dispute as to whether on the day in question, January 27, 1972, this door was opened or closed and as to whether a sign and warning were noted on that door.

There is no doubt that these premises were separated from the book store area designated in Judge Solniker's original warrant, that these premises did not contain books

or boxes believed to contain books or records such as described in the granting clause of Judge Solniker's warrant. Detective Gray testified at the suppression hearing that he did not believe books or records were in this rear area. All that is presented in the record to justify entry into this area is the "plain view" allegedly afforded Detective Gray into the work room by virtue of the disputedly open door thereto.

(3)

113 WEST 42nd STREET

Testimony at the hearing on the suppression issue presented by the defendant seemed to place in evidence the inter-relationship of the work shop area at 210 West 42nd Street with the office area at 113 West 42nd Street, Mr. Herbert Levin, an employee of Mr. Hodas, frequently visited this work shop area and supervised activities therein. Employees of East Coast Cinematics, Inc. frequently made trips between these premises to pick up or deliver the various work products of the shop. Martin J. Hodas also repeatedly and regularly visited these work shop premises.

The search conducted by Detective Gray and his fellow officers of the East Coast offices at 113 West 42nd Street resulted in the seizure of virtually every document, instrument,

book, record and numerous personal articles which were to be found therein.

Detective Gray testified that the office areas were open and not segregated in any way and it appears from his testimony that there was a free flow and movement of employees within these offices and that areas reserved for the use of given individuals were not visibly demarcated as such.

(4)

In the course of the trial of the defendant Martin Hodas, police officer Charles Kadin was called as a witness by the government and gave testimony over the objection of defense counsel as to the general methods and procedures of operation of coin operated amusement machines in the Times Square area based on his observations as a police officer operating and patroling in that area.

POINT I

DEFENDANTS HAVE STANDING TO CHALLENGE THE LEGALITY OF THE SEARCH CONDUCTED AT 210 WEST 42ND STREET.

We refer the Court to the description in the Statement of Facts above of the relation in which defendants Hodas and Levin stood to the repair room premises occupied by East Coast at 210 West 42nd Street. With these facts before the Court, we

turn to a discussion of the applicable judicial decisions framing the law of standing with regard to illegal searches.

The concept of "standing" to complain of Fourth Amendment violations is designed to limit access to constitutional protections to those defendants genuinely aggreived by alleged police illegalities. Originally, the basis for standing as to Fourth Amendment rights was closely related to English common law rights in real property. This was a natural starting point for the Courts of our nation in determining the parameters of Fourth Amendment protection.

In succeeding years, as concepts both of privacy and the integrity of the person of the individual citizen have grown, the Courts have moved towards a broader view of the basis for standing of parties whose Fourth Amendment rights have been aggrieved than the basis afforded in the law of real property. Without examining the long history of this development, we refer the Court to the two major cases which incisively state the present requirements for standing with regard to Fourth Amendment issues, i.e., Jones v. U.S., 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960) and Mancusi v. DeForte, 392 U.S. 364, 20 L.Ed. 2d 1154, 88 S.Ct. 2120 (1968). Jones states a resolution of the standing "dilemma" long confronted by criminal defendants in its most excruciating form in cases involving illegal possession of contraband materials. We

include Jones in this analysis as a statement of general principles relating to standing, but call the Court's particular attention to Mancusi as the case governing the fact situation in this action.

The facts in Jones v. U.S. can be roughly summarized as follows:

Petitioner Jones moved pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for the suppression of contraband seized from him at an apartment he was living at in the District of Columbia. Petitioner Jones did not own the apartment, and was not the tenant thereof at the time of search. His objection to the warrant was related to the 'probable cause' supporting its issuance.

In Jones v. United States, Mr. Justice Frankfurter writing for the unanimous Court, articulated a broad concept of standing which substantially removed criminal defendants from the "horns" of the previously existent standing dilemma stated by Judge Learned Hand in Connolly v. Medalie, 58 F. 2d 629,630 (CA2 NY 19):

> "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners

> at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." Connolly v. Medailie (CA2 NY) 58 F2d 629, 630.

Mr. Justice Frankfurter and the Court met the dilemma posed by Judge Hand head-on as follows:

> Judge Hand's dilemma is not inescapable. It presupposes requirements of "standing" which we do not find compelling. Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicity possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was procedures ultimately referable to constitutional safeguards. (362 U.S., at 266).

Of course, the Jones case was effected by the presence of defendant on the premises at the time of the search. This presence was singularly relevant in that Petitioner Jones had no demonstrably substantial connection with the premises beyond his temporary presence.

In Jones, the Court dismissed an attempt to base standing on narrow and technical distinctions among various groups of people, including, specifically, the employees of a

corporation (See 362 U.S. 261, 262). Because of the unique fact pattern in Jones, however, and the special focus of the Court's ruling occasioned by the nature of the material seized therein, there is some room for argument that no categorical holding is reached as regards the status of employees in relation to the illegal search of corporate property.

In the case of Mancusi v. DeForte, 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S.Ct. 2120 (1968), however, the Supreme Court removed any doubts regarding the general principles to be applied to determine standing.

DeForte, a state prisoner, applied for a writ of habeas corpus in the United States District Court for the Western District of New York and his application was denied (261 F. Supp. 579). His case reached the United States Supreme Court on an appeal by state officials from a reversal of that lower court ruling by the United States Court of Appeals for the Second Circuit (379 F.2d 897).

The facts in this case can be described as follows:

DeForte was a vice president of a Teamsters Union local on Long Island, who was indicted by a county Grand Jury on various conspiracy and related charges. Shortly before the return of the indictment, a subpoena duces tecum was

issued out of the county District Attorney's office requiring that the union produce certain books and records. Upon failure of union officials to comply with the subpoena, the state officials who had served same conducted a search of the union offices and seized union records from an office shared by DeForte with other officers. This search and seizure occurred over the protests of DeForte who was present at the time of the search. Among the issues confronted by the Supreme Court was that of DeForte's standing to complain of the search of the union office.

The Court resolved this issue directly and without equivocation. Since the papers seized were not owned by DeForte, standing could only be based on the"...right of the people to be secure in their...houses..." (392 U.S. 364, at 367). The Court's statement, as articulated by Justice Harlan writing for the majority, on this point leaves no room for future doubt:

> "... capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." (392 U.S., at 368).

The Court reasoned that DeForte, as a long settled principle of law, could object to a seizure from his office

as well as from his home (citing, e.g., Gouled v. United States, 255 U.S. 298, 65 L.Ed. 647, 41 S.Ct. 261; and Osborn v. United States, 385 U.S. 323, 17 L.Ed. 2d. 394, 87 S.Ct. 429. It then pointed out that Jones "explicitly did away with the requirement that to establish standing one must show legal possession or ownership of the searched premises." (392 U.S., at 369).

Finally, the Court reasoned that DeForte, who would clearly have standing to protest a search of his "private" office (392 U.S., at 369), did not suffer any limitation of standing because he shared it with other union officers:

> "It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could have reasonably expected that only those persons and their personal or business guests would enter the office and that records would not be touched except with their permission or that of union higher-ups." (392 U.S., at 369).

It is instructive to note that DeForte's standing inheres in his relationship with the premises and that in no way does the decision in this case turn upon his presence at the time of the search.

Mancusi itself represented a resounding affirmation by the United States Supreme Court of the decision of the

Court of Appeals for the Second Circuit in that case. 379 F.2d 897 (2d Cir.). This Circuit has not modified the principles set forth therein in any subsequent cases;

Mancusi v. DeForte represents the fulfillment of a painstaking evolution of judicial reasoning with regard to the Fourth Amendment. The path of that evolution leads directly to the locked and marked door of the East Coast repair room at 210 West 42nd Street. Defendants Hodas and Levin were in continuing and prolonged contact with the repair room premises. They utilized those premises for business and personal activities and from time to time left personal effects in same. Certainly, the repair room was a commercial premises as regards which the defendants were justified in expecting it to be free of governmental intrusion.

We urge the Court to confirm the standing of defendants Hodas and Levin to protest the illegal search at 210 West 42nd Street. (See: Jones v. United States, 362 U.S. 257; Katz v. U.S., 389 U.S. 347; See v. Seattle, 387 U.S. 541 and Go-Bart Importing Co. v. U.S., 282 U.S. 344.

POINT II

DEFENDANTS HAVE STANDING TO CHALLENGE THE LEGALITY OF THE SEARCH CONDUCTED AT 113 WEST 42nd STREET

Defendants Hodas and Levin were, respectively Pres-

ident and Vice-President of East Coast. They had occupied the former offices of East Coast for a substantial period of time prior to the move from those offices to the new address on the 17th floor of 113 West 42nd Street, The nature of their occupancy of those premises was both personal and in their capacities as officers of that corporation.

The specific documentary evidence obtained by the search of these office premises on January 27, 1972, consisted, among other items, of "black books" which were at the time of that search, and to the best of defendants' knowledge, in drawers of the two desks habitually used by the defendants. The police could not state the specific location source of any of the material seized in the office.

There is not doubt that Appellant occupied a desk in the office course of his employment as principal officer of East Coast. It is undisputed that among the items situated on the surface, and contained in the various drawers of that desk were materials related to the corporate activity of East Coast which were seized. In addition, however, there is no doubt that much of the contents of that desk consisted of items completely personal to appellant and which were kept there by him, as by millions of other office workers in America, out of a recognizable combination of convenience, custom, and the consent of their

employers. This personal aspect of appellant's occupancy of both his desk and other portions of the room such as clothes closets, file cabinets and adjacent desks or tables, is the aspect of property status the Court should note in examining the issue of standing with regard to appellant.

The Warrant issued by Judge Weiss contains, on its face, an explicit authorizing reference to "Martin Hodas" as follows:

> "...to make an immediate search of East Coast Cinematics, Inc., of 113 West 42nd Street, 17th floor occupied by the above company and of the person of Martin Hodas..." (Underlining added) (See Exhibit in Government Affidavit in Opposition)

While the above-quoted language is capable of several interpretations, the very least that can be said about that warrant is that it appears to recognize the existence of a possessory nexus between Hodas and the premises occupied by East Coast at 113 West 42nd Street. In fact, the affidavit in support of the application for this warrant sworn to by Officer Donald Gray makes reference to Hodas through permissible hearsay in the following context:

> "...that the office of the above as well as the office of Martin Hodas is located at 113 West 42nd Street, 17th floor, New York City..."

The affidavit of the officer applying for authority to search clearly embodies a recognition of the personal aspect of Hodas'

status vis-a-vis the office premises, and said recognition is colorably supported by the Warrant granted.

Obviously, Hodas stood in the same relation to the area searched as did defendant Levin.. He had a desk in the premises. Formerly, and for a substantial period of prior time, he had occupied that desk in the office space previously occupied by East Coast. In and on his desk were items relating to the corporate business of East Coast, that of numerous distinct corporate entities in which he was an officer and whose office these premises also were, as well as a number of completely personal items. He, like Levin, and perhaps even more so given his status as President of East Coast, could be expected to employ the clothes closet or rack, file cabinets and adjacent tables and desks in the unpartioned office area for storage of both corporate and personal items.

The status of the defendants vis-a-vis this office space was precisely that of the defendant Mancusi to his office at the union headquarters searched by county law enforcement officers in Mancusi v. DeForte, 392 U.S. 364 (1968). It is the contention of appellant that the same rationale applies to the instant case.

We will not belabor with repetition the discussion of standing undertaken in Point I, supra. We confine argument on

this point to urging the Court to affirm the standing of defendants to move for the suppression of evidence seized from the premises at 113 West 42nd Street.

POINT III

THE SEARCH OF THE EAST COAST PREMISES AT 210 WEST 42ND STREET WAS WARRANTLESS AND ILLEGAL

Pursuant to the issuance of Warrant No. 1 (Government's designation for Warrant issued by Judge Hyman Solniker of New York City Criminal Court on January 27, 1972, authorizing search of ground floor bookstore at 210 West 42nd Street), officers of the New York City Police Department effected a search of separate premises occupied by East Coast. This search both exceeded the limits of authorized activity established in the warrant, and constituted an independently wrongful breaking and entering since the premises in question were separated from the bookstore by a clearly marked door which has been placed as "locked" on the date in question by testimony of defense witnesses.

It is instructive, however, to note that the nature of the criminal investigation pursued by the New York City Police Dept. in the course of this search does not leave open the possibility of a "hot pursuit" or "exigent circumstances"

rationale for any entry to the "East Coast" repair room.

We also ask the Court to hold that search illegal on the ground that even if the entry were lawful on the theory of plain view, the scrutiny of film was unlawful as unauthorized by the warrant for the search of books seized by Judge Solniker (Ex 1-B of Gov't papers) which authorized

> "an immediate search of 210 West 42nd Street, ground floor bookstore, store area and cash register occupied by the above bookstore...for 'Libido Vol., No. 3' and the above said books and records."

How the above warranted authorized the scrutiny of motion picture film cannot be conceived. How it authorized the search of the basement cannot be immagined.

Detective Gray testified that he removed the films from the coating machine and from their boxes, held them up to the light, determined they were obscene, seized them and took them to Judge Weiss. He then changed his testimony on redirect and stated that he did not seize them but rather took two other films of the same titles which were in the possession of the District Attorney to Judge Weiss.

In either event, the search was illegal and not, as held below, a "plain view" search. When we deal with film, we do not deal with guns, explosives or narcotics but with matter presumptively protected by the First Amendment. Roaden v. Kentucky , 413 U.S. 496. Police may not, without warrant or

pursuant to warrant which does not specifically authorize such search, open boxes, remove film from coating machines, hold the 8 mm. film up to the light and make determinations of obscenity for purposes of seizure. Lee Art Theatre v. Virginia, 392 U.S. 636. This is clearly not a "plain view" situation as held by the court below, but rather a search violative of the First Amendment which is an unreasonable search under the Fourth Amendment. Roaden v. Kentucky, supra at 504.

> "The setting of the bookstore or commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression."

Further, even if we believe Detective Gray's recantation, that he did not seize the films from the workshop, but rather secured similarly titled films already in custody from another source, for exhibition to Judge Weiss, theWeiss warrants are ineffectual to warrant the seizures and searches. First, there was no way Judge Weiss could be assured that the films at the workshop were identical to those brought to him. Secondly, Judge Weiss never found the films obscene since the warrant makes no such finding. Without such finding there could be no seizure.. Heller v. New York, 413 U.S. 483; Lee Art v. Virginia, supra; Roaden v. Kentucky, supra; Marcus v. Search Warrant, 367 U.S.717;

A Quantity of Books v. Kansas, 378 U.S. 205.

Since the issuance of the warrants by Judge Weiss was founded upon an unlawful entry (unauthorized by Judge Solniker's warrant), an unlawful search (viewing of films by Detective Gray after removal from boxes and coating machine), a viewing of films not found on the searched premises and not alleged to be owned or possessed by appellant or his corporations, which films were never established to be identical to those allegedly on the premises, and since there was no finding of obscenity of even those films (see warrants of Judge Weiss), the subsequent searches and seizures founded on Judge Weiss' warrants violated each and every precept of First and Fourth Amendment law and were unreasonable.

That the warrants of Judge Weiss was a general warrant and was exceeded in its execution is also obvious from the face of the warrant for 210 W. 42nd St. and from the seizure evidenced from the return.

It is respectfully submitted that the court below should have suppressed, as did the State Court, these fruits of the poison tree. Mapp v. Ohio, 367 U.S. 643; Wong Sun v. U.S. 371 U.S. 471.

POINT IV

THE SEARCHES CONDUCTED AT 210 WEST 42ND STREET AND 113 WEST 42ND STREET WERE VIOLATIVE OF THE FIRST AND FOURTH AMENDMENTS IN THAT THE MATERIAL TO BE SEIZED WAS PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT

It is no longer a subject of debate that a search and seizure in violation of the First Amendment constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment. Roaden v. Kentucky, 413 U. S. 496 (1973). In Roaden, the Supreme Court put to rest any distinction between the remedies for First and Fourth Amendment violations, by saying at page 504:

> "Such precipitant action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the book store or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression." Citing and quoting Stanford v. Texas, 379 U. S. 476, 485.

Thus, it is clear, that if the searches, seizures and warrants were violative of the First Amendment, they are unreasonable under the Fourth Amendment and result in the suppression of the material obtained thereby.

The District Court ruling on precisely these facts, had already determined that the seizure of all of the material from defendants' premises at 210 West 42nd Street and 113 West 42nd Street involved an unlawful search and seizure under the First Amendment. Hodas, Levin,

et.al. v. Murphy, et al, 72 Civ. 554-February 15, 1972-Bauman, J. Merely by reason of the foregoing, and for no other reason, all of the matter covered by Judge Bauman's decision and returned pursuant to Judge Bauman's unappealed order should have been suppressed. The warrant upon which the search of defendants' premises at 210 West 42nd Street was based was founded upon an affidavit of Detective Donald Gray which sought the seizure of three specific films which the said detective claims he observed in his prior seach of the premises. The affidavit asserted that a film with the same title ("Sex Nurse") had been subjected to a prior judicial scrutiny by another judge (Judge Haft) on another date (December 29, 1971- nearly one month before) in connection with some unspecified other proceeding and had been "deemed obscene" at that time. As to the other two films sought to be seized ("Superman" and "Piss on Susan"), the affidavit alleges neither prior judicial scrutiny nor a determination of obscenity after an adversary hearing. It is clear from the affidavit which sought the seizure of the three films, that they had not yet been seized from defendant's premises. This affidavit is apparently contradicted by the subsequently recanted testimony of Detective Gray on cross-examination in which he first claimed to have seized the films from the workshop and brought them before Judge Weiss.

It cannot be asserted that the prior judicial scrutiny by another judge at another time in connection with another proceeding of a similarly entitled film to one of the films seized pursuant to Judge Weiss' warrant legalizes the warrant and the seizure herein. It was the position of the District Attorney of New York County and the police department until the middle of 1973 that once a judge scrutinized a film or book and determined that there was probable cause to believe it obscene, the title of that film and book could be put upon a list and the police, through warrantless searches of premises exhibiting such films and selling such books, could seize such "deemed" films or books whenever they would come across them. This situation came to a head in the case of People v. Gomez, 73 Misc. 2d 623, when the illegality of the procedure was directly challenged. In that case which was not appealed by the People, Judge Levittan held at page 625-6;

> "In the instant prosecution the People contend that prior judicial scrutiny is alone sufficient, without a warrant specific to this prosecution as long as the prior scrutiny was facilitated by an unrelated warrant. The issuance of a warrant is not merely auxiliary to ex parte scrutiny and finding of obscenity. Rather, the purpose of the prerequisite judicial scrutiny is to generate the warrant. The scrutiny is necessary to justify the warrant which is necessary to authorize the seizure. The scrutiny and ex parte finding are not a substitute for the warrant itself nor an excuse from obtaining it for each separate seizure.

> "Apart from the constitutional and statutory indispensibility of a warrant for each seizure in this area sought by police authorities, the practice of using a warrant issued by a judge for a specific seizure as an imprimatur for other seizures not presented to that judge for his approval, is not to be sanctioned. Separate application for each seizure sought by the police is not burdensome to the court, nor, if it were, would it for that reason be indispensible."

The police department has abandoned the procedure used in the instant case and is no longer asserting the right to seize "deemed" films without a specific warrant for such seizure in a specific place signed by a judge who has viewed the film and determined the probable cause to believe the film obscene. It is this abandoned procedure which is the foundation for the warrant for the search of defendants' premises at 210 West 42nd Street. It cannot be overemphasized that the procedure used in obtaining the warrant in the instant case has been conceded by the state authorities (by their failure to appeal in Gomez and their abandonment of the procedure) to be an unconstitutional Fourth Amendment violation warranting suppression. Just as the court suppressed in Gomez so should this court suppress herein.

Since the warrant of Judge Weiss (Exhibit 2-b) is violative of the First and Fourth Amendments, all of the fruits of that search which were utilized to obtain the subsequent warrant of 113 West 42nd Street must likewise be suppressed.

What has been said heretofore about the warrant to search defendants' premises at 210 is equally applicable to the warrant for the search of 113 West 42nd Street (Exhibit 3-a of the Government's papers). The only relevant allegation in the affidavit of Donald Gray in support of the Weiss warrant is the same statement about a film entitled "Sex Nurse" having been deemed obscene theretofore by another judge in another proceeding. Again Judge Weiss signed a search warrant, this time for the seizure of all books and records of East Coast Cinematics, Inc., at 113 West 42nd Street on the basis of an assertion relating to a film which he had not viewed and determined to be probably obscene.

It should be noted that even had another judge in another proceeding found a film entitled "Sex Nurse" probably obscene after judicial scrutiny of the film, the only purpose of such finding would be to issue a warrant for seizure or arrest in order to facilitate the prompt adversary hearing upon which the said film could be determined to be obscene vel non. Since that viewing took place on December 29, 1971, even if a warrant were issued at that time, it would have expired upon the execution thereof or within ten days, whichever first took place. It could not under any circumstances have

been utilized as the basis for any subsequent seizure. Lastly, as Gomez held, it certainly could not relieve any other judge of his constitutional obligation to view the film and determine the probability of obscenity prior to issuance of a warrant for its seizure from another place at another time .

POINT V

THE SEARCH CONDUCTED AT THE EAST COAST PREMISES AT 210 WEST 42ND STREET WAS ILLEGAL BECAUSE THE WARRANT THEREFOR WAS NOT ISSUED ON PROBABLE CAUSE

Assuming arguendo the Government's representations as to the search of East Coast at 210 West 42nd Street to be true, we still urge the Court to repudiate the search as illegal and reject all information obtained from it as tainted because the warrant authorizing the search was not issued upon probable cause.

The affidavit of Officer Gray of the New York City Police Department (affidavit No. 2) on the basis of which Judge Daniel Weiss of the New York City Criminal Court issued Warrant No. 2 (dated January 28, 1972, and authorizing search of East Coast premises at 210 West 42nd Street) sets forth this factual basis as probable cause (paraphrasing and enumerating points in the affidavit):

(1) Deponent observed numerous peepshow machines and boxes of films;

(2) One box of film was labelled "Sex Nurse";

(3) "Sex Nurse" had been deemed obscene on December 29, 1971 by Judge Robert Haft;

(4) Deponent observed many projectors, peepshow machines, films, a large quantity of wood and power tools;

(5) Deponent observed two other films which had been turned over to him in previous obscenity raids and which he submits with affidavit for judicial review;

(6) Deponent asserts there is probable cause to believe three films on premises "obscene";

(7) Deponent found peepshow machines in the underground cavern beneath 210 West 42nd Street.

Only one of the three films in question had been deemed obscene at the issuance of the warrant. It is not even asserted that there had been a determination of obscenity vel non of even that film which would have required an adversary proceeding.

Interestingly, Detective Gray did not even assert that he saw the entire films in question. He merely saw a lable on boxes which he chose to characterize as "boxes of film"and briefly held the film up to the light.

Deponent's affidavit is throughout both speculative and conclusionary in content. Nowhere do facts supported by or elicited from personal observations make their appearance. Thus, for example, we read phrases such as:

> "Deponent believes that the above two movies were to be placed in peepshows and that the above "Superman" movie had more than six copies."
> (Affidavit No. 2, Paragraph 5)

The above phrase is classically conclusionary and utterly lacking in any statement of fact.

The law as to the minimum requirements for a determination of "probable cause" for the issuance of a warrant is clear in its articulation of a general standard, but mandates intensive analysis of the facts in a given case.

The general definition of probable cause can be stated as facts sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that contraband is present, or a crime is being or has been committed, or that the law is being violated on the premises to be searched. see, e.g., Stacey v. Emery, 97 U.S. 642, at 645 (1964).

It has further been pointed out by the United States Supreme Court that facts and circumstances underlying the deponent's affirmation of probable cause must be spelled out See, e.g. Aguilar v. Texas, 378 U.S. 108, at 112 (1964).

Officer Gray attempted to set forth such facts and circumstances in his affidavit. The only facts presented to the issuing judicial officer is that one (1) of the boxes bore a title of a film as to which a criminal court judge nearly one month before had found probable cause to believe obscene; (2) an undescribed snapshot of that film was affixed to the outside of that one box. All the remaining language in the affidavit is conclusionary or expresses unsubstantiated "belief" of the deponent.

We submit that particularly in the circumstances of a presumptively First Amendment protected activity such as film exhibition and distribution, the affidavit does not state sufficient facts with any particularity sufficient to constitute "probable cuase".

We urge the Court to find a failure of probable cause for the issuance of a warrant since the facts in Affidavit No. 2 do not substantiate anything greater than a mere vague suspicion of participation in criminal activity.

It cannot be overemphasized that judicial scrutiny must preceed the search and seizure not follow it. Heller v. New York 413 U.S. 745; Roaden v.Kentucky, 413 U.S. 757.

POINT VI

THE SEARCH CONDUCTED AT EAST COAST'S OFFICE AT 113 WEST 42ND STREET WAS UNREASONABLE BECAUSE THE WARRANTS AUTHORIZING IT WERE NOT ISSUED UPON PROBABLE CAUSE

The Fourth Amendment to the United States Constitution prohibits the issuance of warrants to search except upon 'probable cause'. We have already discussed the central principles which guide analysis of affidavits supporting such issuance. Without needless repetition of those principles, we reaffirm the discussion in Point IV, supra, and urge the Court to reject Affidavits No. 3 and 4 of Officer Donald Gray as insufficient to demonstrate 'probable cause' for the issuance of Warrants No. 3 and 4 for the search of 113 West 42nd Street. We shall examine each affidavit separately for ease of reference.

(1) Affidavit No. 3

Affidavit No. 3 supported the application for a warrant to search the office occupied by East Coast on the 17th floor of 113 West 42nd Street.

Officer Gray's sworn statement contains numerous references to the "peep show" business. Clearly, the "peep show" business is not an illegal enterprise, per se. This fact renders certain assertions of the affiant puzzling in

their support of the warrant. For example, Deponent (Gray) refers to an informant who has told him that books and records (of East Coast) "...reflect the peep show business."

Is Officer Gray informing Judge Weiss (who issued the subject Warrant) that a given corporation maintains books and records regarding a legal business - peep show? Have any further facts been introduced in this affidavit to establish even a suspicion of illegal activity of any kind on the part of East Coast? What does the term "reflect" mean?

The affidavit is clearly a travesty in its overt failure to establish a basis for probable cause. The affiant still refers to one still photograph affixed to a box of film marked "Sex Nurse" as the only basis for criminality of <u>any</u> kind at <u>either</u> of the premises in question. Even if that snapshot justifies more than mere suspicion of any criminal act with regard to the property at 210 West 42nd Street, how does it lead to a conclusion that a massive seizure of records at other premises is justified or that wholesaling obscenity may be reasonably inferred?

East Coast is still engaged in a business the subject matter of which is presumptively protected by the First Amendment. Neither it nor appellant has ever been convicted on our obscenity charge. There is no indication that the use of Warrant No. 2 has produced further

evidence relating to the purveyance of obscene materials. On what basis in 'probable cause' does Warrant No. 3 issue?

We urge the Court to find a lack of 'probable cause' as to Warrant No. 3.

Warrant No. 4

Affidavit No. 4 of Officer Gray was submitted to Judge Hyman Solniker of the New York City Criminal Court in order to obtain a warrant for the search and seizure at 113 West 42nd Street of the books and records of a number of corporations other than East Coast and those of the individual Martin Hodas as well, after the search was admittedly made.

An examination of the subject Affidavit reveals that two new facts are presented to Judge Solniker to justify this substantial additional seizure. The first is the deeming of the "obscenity" of two of the films seized at 210 West 42nd Street pursuant to Warrant No. 2 (see affidavit No. 4, page 3, paragraph 11). This determination has been made in a non-adversary context, after the search was conducted. This additional determination is not connected in any manner by the affiant with the request for a broad authority to search. This additional fact stands in isolation and provides at most some additional basis for an inquiry as to East Coast.

Certainly it does not implicate Martin Hodas or any of the additional named corporations.

The second "new" fact introduced in affidavit No. 4 is that more entities than East Coast occupy the 17th floor premises at 113 West 42nd Street. Affiant Gray states in Paragraphs 5,6 and 7 of his affidavit that the corporations share rooms with East Coast and their records are apparently commingled with those of East Coast. These averments are the only facts or apparent circumstances introduced by Gray in his affidavit, which establish even a tenuous connection between East Coast and these other individuals and entities.

Gray does make certain allegations regarding the other entities and Martin Hodas which are stated in conclusionary form in his affidavit. Several of these statements are truly comical.

In paragraph 10 of his affidavit (No. 4), for example, he states (on the tenuous evidence of <u>one</u> change of address letter from Martin Hodas to the Post Office, which letter is annexed to his affidavit) that he believes books and records of <u>all</u> these corporations will reflect a peep show business using obscene movies. This statement is totally conclusionary. It establishes and asserts no additional facts bearing on the conclusion. The issuing judicial officer is essentially

asked to grant a sweeping warrant to seize the financial records of these corporations based on the evidence of a single innocent letter from Martin Hodas to the United States Post Office.

In paragraph 9, Affiant states that as a result of his examination of the books and records of the named corporations (presumably carried out in a colorably legal execution of Warrant No. 3) he has determined that they are all "... involved in sexually oriented material" (affidavit No. 4, Paragraph 9). Apparently, the ledgers themselves reveal these activities. Affiant does not feel obligated to let Judge Solniker in on his mode of analysis or the facts underlying his stated belief. Even if we assume his statement in Paragraph 9 to have some foundation, however, it does not explain a jump from sexually oriented materials to criminal activity of any kind.

The affidavit supporting Warrant No. 4 fails to state facts sufficient to sustain 'probable cause' for the issuance of a search warrant.

Warrants No. 3 and No. 4 must both be overturned for lack of "probable cause," but the relevancy of warrant No. 4 is debatable since the search admittedly was conducted pursuant to warrant No. 3, prior to judicial scrutiny.

POINT VII

THE SEARCH OF THE EAST COAST OFFICE AT 113 WEST 42ND STREET WAS ILLEGAL BECAUSE WARRANTS NO. 3 AND NO. 4 WERE "GENERAL WARRANTS"

The Fourth Amendment to the United States Constitution placed restrictions on the issuance of search warrants largely for the purpose of limiting the abuses of " general warrants" against which the courts of England had waged a long and ultimately successful battle. See, e.g., Wilkes v. Wood, 19 How St Tr 1153 (1963).

At issue in this case is the question of whether the warrants issued by Judges Weiss and Solniker for the search of East Coast offices at 113 West 42nd Street and the seizure of "books and records" of several corporations were "general warrants".

We have already reviewed the affidavits supporting the issuance of the Warrants in question quite extensively in both this memorandum and by means of the Defendants' affidavits submitted herewith. We refer the Court, in particular, to Point V, (2) herein where an analysis was undertaken of affidavit No. 4 from the perspective of 'probable cause'. This analysis is helpful in enabling the Court to examine the pattern of police conduct which characterizes this entire

"chain" of searches and investigation. In turn, this conduct underlines the danger of vague and general languages in a warrant placed into the hands of even well-meaning inadvertently oppressive, enforcers of the law.

The relevant language of the warrants at issue reads as follows:

> (1) Warrant No. 3 (East Coast only at 113 West 42nd Street)
> "You are therefore commanded at any-time to make an immediate search of East Coast Cinematics Inc. of 113 West 42nd Street, 17th floor ... for books and records of East Coast Cinematics., Inc. reflecting a 'peep show' business in New York County in violation of 235. 06 of the Penal Law..."
> (Warrant No. 3);
>
> (2) Warrant No. 4 (other corporate entities at 113 West 42nd Street)
> "You are therefore commanded to make an immediate search of the 17th floor office of the above corporation at 113 West 42nd Street...for the abovesaid property (referring to"the financial records of the following corporations") ..."
> (warrant No. 4).

It is instructive to note with particular reference to Warrant No. 4 that while the warrant recites that "... there is probable cause for believing that certain property namely the financial records of the following corporations are evidence of the crime of wholesale promotion of obscene

material 235.06 of Penal Law ...", nowhere in the "therefore" or "command" clause of the warrant is there even the superficial limitation on the records to be seized created by such words as "reflecting the crime of" or similar language. Warrant No. 4 orders the seizure of all the financial records of all the named corporations.

No contraband, per se, is noted for seizure by either warrant. No classes of items other than financial records or "books and records "are listed in either warrant. Within the categories of items designated for seizure, no examples are given, no restrictions imposed, no sub-classes denominated, and no qualifying language employed other than the single phrase in Warrant No. 3"reflecting a peep show business", etc. Warrant No. 4 does not even contain that qualifying phrase. It is the contention of the defendants that such warrants are unlawful under the laws of the United States of America.

The basis for this conclusion can be most easily viewing by examining the landmark case of Stanford v. Texas, 379 U.S. 476, 13 L.Ed. 2d 431, 85 S. Ct. 506 (1965). Stanford is almost directly on point with the instant case since it resolves a Fourth Amendment question in the context of a First Amendment fact pattern.

In Stanford, a warrant was issued authorizing search

and certain seizures from residential premises occupied by an individual believed by local law enforcement authorities to be engaged in violation of the Suppression Act, Texas statute banning Communist Party activities within that state (379 U.S., at 477).

The warrant authorized law enforcement officers to enter that individual's home and search for and seize "... books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas..." (379 U.S., at 478 and 479).

The warrant embraced both presumptively First Amendment protected materials such as "pahmphlets" and material such as "memoranda" which clearly falls outside the ambit of that Amendment.

As in the instant searches and seizures , law officers seized every related item on the premises from a book by Mr. Justice Hugo Black (379 U.S. at 479, 480) to the marriage certificate, insurance policies and personal correspondence of the individual whose premises were searched. Such a method of execution underlines the abuses inherent in the issuance of vague and broadly phrased warrants. The manner of execution, however, did not incur the specific criticism of the Court. Rather it was the language of the warrant itself that was

attacked.

Referring to the language describing items to be seized the Court held that:

> "The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history:
>
> (379 U.S. 486)

The opinion of the Court, as articulated by Mr. Justice Stewart, develops the historical basis for the constitutional protection embodied in the Fourth Amendment. The discussion focuses to a great extent on the eighteenth century struggle in England to restrict the "general warrant" employed by officers of the Crown in the search for evidence of, and as incidental harassment of individuals suspected of, the crime of "seditious libel". See, Stanford v. Texas, 379 U.S. 476, at 482, 483.

The Court extensively paraphrases the holding of Lord Camden in the famous English case of Entick v. Carrington, 19 How. St. Tr. 1029 (1765), as cited in Stanford v. Texas 379, U.S. 476, at 483, 484. The following language describing that case is instructive in perceiving the motivation and purpose of the Court in the Stanford holding:

> A warrant was issued specifically naming him and that publication, and authorizing his arrest for seditious

> libel and the seizure of his "books and papers". The King's messengers executing the warrant ransacked Entick's home
>
> for four hours and carted away quantities of his books and papers. In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment, Lord Camden declared the warrant to be unlawful. "This power", he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper."

The decision in Stanford v. Texas that "... we think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid---a general warrant". (379 U.S., at 480), arises from the nexus of Supreme Court holdings distinguishing allegedly obscene materials from other forms of "contraband". (see, e.g., Roaden v. Kentucky, supra, and A Quantity of Books v. Kansas, 378 U.S. 205) with the principles embodied in the Fourth Amendment and illustrated by cases such as the English prototype of Entick v. Carrington. This nexus has long been recognized by the Court as highlighting the significance of the Fourth Amendment in its relation to rights protected by other Amendments. See, e.g., dissenting opinion of Mr. Justice

Douglas in Frank v. Maryland, 359 U.S. 360, at 376.

Citing and quoting from Marron v. United States, 275 U. S. 192, at 196 (1927), the Court recapitulated its reasoning regarding the Stanford warrant:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another As to what is to be taken, nothing is left to discretion of the officer executing the warrant." (emphasis added)

The warrants in the instant case, as received above, are even more general than the Stanford warrant.

Warrant No. 3 names "books and records" as the objects of seizure without an attempt to restrict same to the crime allegedly evidenced by certain "obscene" films. The reference to the particular statutory section violated is not a helpful guide to the executing officers. §235.06 of the New York Penal Law reads as follows:

> "A person is guilty of obscenity in the first degree when knowing its content and character, he wholesale, promotes or possess with intent to wholesale promote, any obscene material." (39 McKinney's 53)

What direction does this reference afford the officer executing the warrant? He is searching "books and records." How will he know which "reflect" the crime defined above? May he seize records relating only to the three "obscene" films?

Must he seize all papers on the premises? Clearly, Warrant No. 3 leaves every aspect of the search and materials to be seized to discretion of the executing officers. This is a direct contradiction of the principles of Stanford and Marron.

Warrant No. 3 is illegal as a "general warrant."

Warrant No. 4 is even more extraordinary. The "enabling" or "seizure" clause of the Warrant authorizes seizure of "the abovesaid property". Such property is described as "the financial records of the following corporation". This language is fascinating. As in Entick v. Carrington, no judicial determination of a crime has been reached. As in Entick v. Carrington, all "papers" of "suspect" corporations are to be seized. As in Entick v. Carrington, the execution of this general warrant involved "occupancy" of private offices for a substantial period, and seizure of virtually every scrap of paper in those ofices (see affidavit of Defendant Hodas submitted herewith).

Warrant No. 4 is illegal as a general warrant.

The Government attempts, in its memorandum of law, to persuade the Court that such cases as United States v. Scharfman, 448 F.2d 1352 (2d. cir. 1971), have justified the seizure of 'books and records' pursuant to warrants employing that term.

It must be pointed out that the nature of the crime

(or contraband) considered in the Scharfman warrant diverges entirely from the apparent First Amendment related activity of East Coast which is the subject of the warrants examined in this action. Scharfman involved the seizure of furs, and various "instrumentalties" of the crime evidenced thereby. The Court upheld the use of the term "books and records" as a generic description of items to be seized only in a warrant that qualified such general language by reference to a precise defined crime (as opposed to the "obscenity" allegation herein) and by including that generic class with other classes of items to be seized relating to the alleged criminal activity, including the contraband itself.

Such is preeminently not the case with the warrants in the instant action where the only definition of items to be seized is a generic term. Scharfman does not articulate the principle that employment records, electric bills, fire insurance policies, personal notebooks, ledgers of petty cash expenses, etc., can all be seized pursuant to a warrant authorizing seizure of "books and records" relating to the crime of obscenity without the language of such a warrant constituting an unconstitutional "general warrant"

Lastly it should be noted that, unlike the seizure in Scharfman, the seizures authorized by the warrants herein effectively halted the dissemination of protected expression by putting appellant out of business. This effected a total prior restraint as surely as the cloture in Near v. Minnesota, 283 U.S. 697. The general warrant authorizing such prior restraint is, therefore, invalid under the First Amendment as well as the Fourth.

POINT VIII

THE DEFENDANT MARTIN J. HODAS WAS PREJUDICED BY THE INTRODUCTION OF THE TESTIMONY OF POLICE OFFICER CHARLES KADIN BY THE GOVERNMENT

Over the objections of counsel for the defendant, police officer Charles Kadin of the New York City Police Department was introduced as a witness for the government in this trial. Mr. Kadin's testimony was of virtually no probative significance. It consisted of little more than a general statement concerning the operation of coin operated amusement devices in the Times Square area, which statement was concededly not relatable or correlated with the machines operated by East Coast Cinematics, Inc. (69, 72).

The entire thrust of the testimony of Kadin was to place uppermost in the minds of the jurors the "tainted" aspect of

the business of the defendant. Pursuant to application of appellant's attorney, the District Court, in its rulings before trial, acknowledged the possibility of prejudice inherent in the usage of certain characterizing language such as "peep show" and had taken strenuous steps to bar such language and other irrelevant material from the trial of this case.

In contradiction with the spirit of these pre-trial rulings, counsel for the government introduced Mr. Kadin for the purpose of entering testimony on the record and before the jury which could have no beneficial effect on the record and before the jury which could have no beneficial effect on the intelligibility of its own case or a definition of the issues of fact, but which could and did prejudice and confuse the jurors. The Court, after the People's case, then permitted the interjection of the "peep show" issue into the case.

It has traditionally been held by the United States Supreme Court that the highest obligation of the Courts to a criminal defendant is to assure the defendant every opportunity for a fair trial by carefully defining and limiting the scope of testimony presented to the jurors. The attention of the jury

should be centered upon the relevant fact questions in a criminal action. Lucas v. Brooks, 18 Wall 436.

Evidence irrelevant and immaterial to the presentation of a prosecution case should be excluded from the purview of jury analysis. Macon County v. Shores, 97 U.S. 272 and Storm v. United States, 94 U.S. 76.

One of the crucial elements of a fair trial is the opportunity for the jury to review only such evidence as is competent in introduction for purposes of determining the issue of guilt or innocence. In the instant case the defendant Martin J. Hodas was deprived of a fair trial by the introduction of irrelevant material designed to frame the underlying business interests of the defendant as related to criminal activity with a specific appeal to prejudices related to the sale of sexually oriented, or even obscene, materials. This occurrence deprived the defendant of his due process rights. Se: Bruton v. U.S., 391 U.S. 123

POINT IX

THE CHARGE OF THE JUDGE ON EXTORTION WAS ERRONEOUS BY RULING THE PAYMENTS NON-DEDUCTIBLE

The entire theory of appellant's case was founded upon an uncontroverted assertion that a person by the name of Glass, by means of kidnapping, threats, and a bombing of one of appellant's stores, extorted various weekly payments from appellant which exceeded the sum claimed by the government to have been collected by appellant for the year in question and unreported for tax purposes.

Appellant produced four witnesses who testified to the payments to Benny Glass. Their testimony was unshaken on cross-examination. The government presented no evidence to indicate that the payments were not made.

Appellant's testimony showed that when the money was removed from the coin operated film machines, one-half was given to the operator of the premises in which the machine was located, the bulk of the rest was given to Benny Glass, and the remainder was kept by the business and reported for tax purposes. It is notable that the government did not claim that the corporate profits or income should have included the gross receipts from the machines rather than the one-half thereof retained by the corporation. It is therefore incongruous for the government to assert that, assuming the payments made by appellant to Glass were essential to carry on the business in the Times Square area, such payments were not necessary and ordinary deductions on which appellant was not and should not

be required to pay a tax. It is obvious that the same fear that motivated the payments required that they not be set forth on the tax returns. This, however, is a matter of form as opposed to substance. If the payments, had they been itemized on the tax returns, were legitimately deductible, how could appellant be convicted of tax evasion?

Secondly, such payments to Glass were no less includable in the gross income figures of the corporation than the payments made to the store owners. The government did not even attempt to assert that the failure to report the 50% of the proceeds of the machines turned over to the store owners constituted tax evasion.

A second point raised by appellant was that the sums paid to Mr. Glass as a result of extortion constituted, at the very least, an uninsured casualty loss which should not have been taxable. The Penal Law of the State of New York defines larceny in Section 155.05 thereof as including obtaining money through extortion (sub-section 2(e)). Thus, under the laws of the State of New York, the monies paid by appellant to Benny Glass constituted no less uninsured casualty losses than had Benny Glass entered the premises of appellant and stolen the money by force of arms.

The Judge failed to charge that if the jury believed that the monies were paid to Benny Glass, in the amounts, in the manner and for the reasons uncontrovertedly testified to by appellant and his fellow witnesses, than there could be no tax evasion. Instead the Court charged as follows (475):

> "Defendants claim the unreported income referred to by the government consisted of monies extorted from Hodas by a man named Glass. Hodas has testified that he believed such payments were

> deductible and that he did not report them because of fear that if he was called upon to explain the payments to Glass he would endanger his life and that of his son, as well as risk physical injury to his business.
>
> If you find that payments were made to Glass that does not end the matter because the mere fact that a payment was made does not entitle the defendants to an acquittal. You must further find that Hodas had an honest belief that such payments were deductible under the Tax Law. If you make this finding, then you should acquit Hodas and Levin on this count, as well as Count 1.
>
> Payments to meet the demands of an extortionist are clearly not deductible under the law. Neither may they be considered as ordinary business expenses or similar to larceny, both of which are deductible.
>
> Extortion is neither theft nor an allowable business expense. Finally, in this regard, neither coercion nor compulsion are excuses for violating the law under the facts as testified to by the defendants."

From the foregoing it is apparent that the Court charged appellant into a conviction, erroneously instructing the jury that extortion is not similar to larceny and may not be considered an ordinary business expense. Exception was taken to this element of the charge (487). See 155E of the Internal Revenue Code.

Lastly, it should be noted, that the Court refused to allow the appellant a defense that Glass was a joint venturer and that monies paid to Glass were not includable in gross income (487). It is respectfully submitted that Glass was as much a joint venturer with appellant as the store owner was once the relationship was established through extortion.

CONCLUSION

THE EVIDENCE SEIZED SHOULD HAVE BEEN SUPPRESSED, THE SEXUALLY ORIENTED NATURE OF THE FILMS EXHIBITED IN APPELLANT'S MACHINES SHOULD NOT HAVE BEEN BROUGHT TO THE ATTENTION OF THE JURY, AND, CONSEQUENTLY, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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